The Projects and Construction Review

Fifth Edition

Editor
Júlio César Bueno

Law Business Research

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This article was first published in The Projects and Construction Review - Edition 5
(published in July 2015 – editor Júlio César Bueno)

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-54-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

39 ESSEX CHAMBERS

ALLEN & OVERY LLP

ANDERSON MŌRI & TOMOTSUNE

ARAQUEREYNA

BANWO & IGHODALO

BASHAM, RINGE Y CORREA, SC

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EDITOR'S PREFACE

> *La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque.* Michel Villey, *Critique de la pensée juridique modern* (Dalloz (Paris), 1976).

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the Royal Institution of Chartered Surveyors (RICS), the Chartered Institute of Arbitrators (CIArb), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF) and the American Bar Association's Forum on the Construction Industry (ABA). Some important issues recently discussed during the annual meeting of the International Academy of Construction Lawyers (IACL) have also been included for a broader debate. All of these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are relatively young, highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from three new jurisdictions in this year's edition: East Timor, Nigeria and Saudi Arabia. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 30 countries has shown us that to understand the world we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms who graciously agreed to participate.

Finally, I dedicate this fifth edition of *The Projects and Construction Review* to a non-lawyer, a non-engineer, but yet a most noble man: Ozias Bueno, my dearest father, whose tenderness, dedication and wisdom has given me nothing less than the desire to also be a model father to my own little son.

Júlio César Bueno
Pinheiro Neto Advogados
São Paulo
July 2015

Chapter 5

ARGENTINA

Pedro Nicholson[1]

I INTRODUCTION

Stability has by no means been the hallmark of the past two decades of Argentine economic history. With booms followed by debilitating busts, Argentina has experienced a fair amount of economic turmoil from the 1990s through to the present day, with the exception of a period of stability from 1992 to 1995 and from 2005 to 2010. Argentine project finance – and the relative lack thereof in comparison with other Latin American countries – cannot be understood without at least a cursory glance at this history.

The political career of Carlos Menem, president from 1989 to 1999, set the stage for much of this story. Elected while the country was enduring a stubborn period of hyperinflation, Menem enacted a series of neo-liberal reforms to privatise large sectors of the Argentine public apparatus. His first administration, of six years, met with considerable success, while his second term, of four years, was marred by corruption and unemployment.

When Menem first took office in July 1989, Argentina's currency was not the peso but the austral, which continued to depreciate despite Menem's attempt to stave off inflation. Finally, in 1991, Menem's administration abandoned the austral and pegged the Argentine peso to the US dollar in a final attempt to combat hyperinflation and spur economic growth. Under this scheme, termed the 'Law of Convertibility', the Argentine Central Bank was required to maintain one US dollar in reserve for every peso in circulation. Initially, the plan met with considerable success, injecting stability into a ravaged Argentine economy.

Alongside the currency reform, Menem embarked on a neo-liberal programme to privatise utilities (including electricity, gas and water), the postal service, and the telephone network. This was buoyed by a large influx of foreign direct investments that

1 Pedro Nicholson is a partner at Estudio Beccar Varela.

mitigated inflation, setting the stage for the rapid growth of the mid-1990s. Arguably the most important legacy of Menem's privatisation programme was the Retirement and Pension Funds Administrators (AFJP), established in 1994. Argentine workers were given the choice of placing their retirement savings in private hands – administered by the AFJP – or continue under a publicly administered scheme.

Yet despite Menem's attempts, unemployment figures remained high, and the public debt swelled. As funds from the privatisation of state industries began to dry up by the late 1990s, large-scale tax evasion and money laundering grew in prevalence, bleeding the country of much-needed funds. Moreover, the fixed exchange rate between the peso and the US dollar made it cheaper to import goods than to export them, contributing to a decline in domestic manufacturing and an increase in unemployment. To make matters worse, two of Argentina's major trading partners – Brazil and Mexico – suffered economic crises of their own, provoking a general mistrust of Latin America among international investors and harming Argentina's already reduced exports.

When President Fernando de la Rúa took office in 1999, Argentina was mired in a recession marked by economic stagnation. By 2001, with investor confidence plummeting and money flowing out of the country, the Argentine public sensed the worst, which led to a run on the banks. People began draining their bank accounts, hurriedly converting pesos into US dollars and sending the money abroad. Panicked, the government responded with the '*corralito*' in December 2001, a series of measures that effectively froze bank accounts for a period of about a year. Initially, withdrawals were capped at a scant US$250 per week. An enraged public took to the streets in a grand *cacerolazo*, first banging pots and pans in protest and later escalating to property damage, targeting banks and large foreign corporations. President Fernando de la Rúa was forced to flee the capital in a helicopter on 21 December 2001, and, after a series of three different presidents failed to calm the crisis, Néstor Kirchner took office in May 2003.

In the meantime, the Law of Convertibility was abandoned, and the government declared that all bank accounts held in dollars would be converted to pesos at an official rate. The peso experienced a large devaluation as a result, rapidly depreciating to an exchange rate of four pesos to every US dollar from the previous one-to-one ratio. Inflation, too, swelled to alarming rates. But the devaluation of the peso had a positive economic effect as well: Argentine exports suddenly became cheap and competitive abroad; foreign currency reserves recovered; and Argentina was able to pay off its full debt to the International Monetary Fund in 2006. Argentina's GDP grew robustly, increasing annually between 8.5 per cent and 9.2 per cent from 2003 to 2007.

The global recession of 2008 left its mark, however. When Néstor Kirchner's wife, Cristina Fernández de Kirchner, took office in December 2007, growth was strong. By October 2008, the government had resorted to nationalising US$30 billion of private pension funds administered by the AFJP to avert another economic disaster, establishing the National Pension Funds Administration Authority in its place. These funds have since been used to finance select project finance transactions barefacedly chosen for their political capital.

The Argentine economy grew at a rate of around 8 per cent between 2005 and 2010, although since mid-2012 it has been slowly entering into recession, caused mainly by investors' lack of confidence about the direction in which the political situation is taking the country, mainly as a result of the foreign exchange restrictions in force and the

current government's seeming lack of respect for the rule of law. Throughout the past two years, the Argentine economy has plunged into a deep recession affecting most sectors of the economy; notwithstanding, some sectors are now optimistic about the future, especially as the country is expected to receive a flood of new investment from the end of 2015, when the next government will be in place.

II THE YEAR IN REVIEW

Despite the negative global context with regard to metal prices, the mining sector in Argentina saw some developments in 2014. The national company CIMINAS has acquired total control over Minera IRL Patagonia SA (now Minera Don Nicolás SA), holder of the Don Nicolás gold and silver project located in the province of Santa Cruz, currently in its construction stage. Furthermore, during 2014 First Quantum Minerals Ltd acquired the Taca Taca project, a world-class copper deposit located in the province of Salta, which is expected to enter its construction phase during 2015. Goldcorp moved forward with the construction of the Cerro Negro gold project in the province of Santa Cruz, which is among the most important projects in this sector. Moreover, Yamana announced the beginning of the construction of the Cerro Moro mine, a gold project also located in the province of Santa Cruz. Finally, Glencore announced the development of the Bajo El Durazno mine, located in the province of Catamarca very close to the Alumbrera project.

Law No. 26,737 dated 30 December 2011 (the Rural Land Law) regulates and limits the purchase of rural real estate by foreign nationals. This Law does not affect any acquired rights as of the date of enactment and only applies to any future acquisitions or sales of land, which will no doubt affect future mining and energy projects. It sets out the following limits on foreign ownership or possession of land:

a in general, a limit of 15 per cent of foreign ownership or possession of rural land in the national territory. Persons and entities of the same foreign country may only comprise 30 per cent of said 15 per cent quota;

b each foreign owner or possessor may only hold a total of 1,000 hectares of land, within said limited percentages and depending on the specific jurisdiction (i.e., this surface area may be somewhat larger or smaller); and

c foreign nationals may not own any land that includes permanent and important bodies of water, or any land located in a border security zone.

In terms of actual construction, the most significant projects are the following:

a The construction of a 'green' building of 28 floors by Banco Macro in Catalinas Norte. Catalinas Norte is the key office space area in the city. The sale was effected through a bidding process organised by the city of Buenos Aires and the total amount invested is about US$210 million.

b Al Rio, a mega venture located in Vicente Lopez, 15 kilometres from Buenos Aires City, right next to the Rio de la Plata. Sixteen hectares long, this development includes a mall, a residential complex, offices and an open auditorium.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

The mining and energy sectors typically utilise the build-operate-transfer and build-own-operate structures of financing. Yet whatever structure is chosen, there is no general obligation for entities to register financing agreements with the government for them to become valid.

In certain cases, however, registration is actually beneficial. For example, Argentina has signed treaties with a number of countries to avoid double taxation of income and net assets, including Germany, Bolivia, France, Italy, Canada, Finland, the United Kingdom, Belgium, Denmark, the Netherlands, Norway, Spain and Russia. Argentina has yet to sign a tax treaty with the United States, although an agreement regarding the promotion and protection of reciprocal investments has been in force between the two countries since 1992.

Mining projects are also subject to special tax treatments; if a project wants to benefit from the tax incentives – which it surely does – it must register with the requisite tax authority. The same holds true for projects pursued in the energy sector. Different considerations apply to project documents, especially those creating a security interest. As will be described below, certain securities such as registered pledges and mortgages remain unenforceable unless they are registered with the appropriate government agency.

IV RISK ALLOCATION AND MANAGEMENT

As mentioned in the introduction, the Argentine project finance sector is no stranger to financial and political risks. Once beset by military dictatorships, Argentina has had a democratically elected government since 1983, and has adhered to a system of representative democracy ever since. Politically, Argentina has been rather stable the past few decades; economically, it has experienced both surging growth and daunting setbacks. So while political risks are minor, Argentina's recent economic history has left a legacy of regulations that continue to dramatically affect project finance and construction contracts.

The most salient example arose as part of the Law of Convertibility: a prohibition on indexation of contracts and payments. A valuable tool used by private parties to manage changes in price levels, indexation involves writing into a contract an upward adjustment of nominal payments based on standardised inflation rates. In 1991, however, the government prohibited indexed contracts, including all manners of currency updates, cost variations and debt restatements. Although the prohibition on indexation was specifically promulgated in tandem with the Law of Convertibility, the prohibition on indexation inexplicably remained even after the Law was scrapped in 2002.

With inflation safely ensconced in the Argentine financial landscape, the architects of project finance and construction contracts have become creative with legally permissible methods to stem rising costs, notwithstanding this prohibition. The most frequently used methods include price escalations and a combination of fixed and variable prices; for example, a three-year lease may provide for a fixed increase in rent each subsequent year, such as US$100 for the first year, US$125 for the second and US$155 for the third. While this may well seem like indexation, Argentine courts have confirmed that these price escalations do not run foul of the law. In addition, investments

in construction projects often involve a combination of fixed down payments and subsequent instalments that vary in cost based on the expense of construction materials.

Indeed, because of the prohibition on indexation, gradual inflation is difficult to compensate for in construction contracts except in the manners described above. The next question becomes whether *force majeure* clauses can be invoked in cases of hyperinflation; while no legal codes exist to that effect, the answer is almost certainly no. In Argentina, *force majeure* clauses are permissible, but their applicability is limited to situations in which the events are extraordinary and unpredictable. In Argentina's case, hyperinflation is not an extraordinary occurrence; it has happened several times before and could undoubtedly happen again. As a result, the majority view is that an inflation crisis – even a crisis of hyperinflation – constitutes an expected phenomenon that does not merit the exercise of a *force majeure* clause. The message here is clear: inflation is a foreseeable evil for Argentinians and prudent parties ought to invoke other measures to manage the risk.

V SECURITY AND COLLATERAL

Similar to those elsewhere in the world, security interests in Argentina can be obtained through pledges and security assignments, and can be ensconced in trusts or tucked into mortgages.

When it comes to pledges, Argentina has a two-tiered system of ordinary and registered pledges. The ordinary pledge functions as one would expect: the debtor physically transfers the pledged property into the possession of the creditor or into the custody of a third party. However, as will be described in greater detail below, Argentina specifically disclaims self-help remedies if and when it comes time to foreclose on a pledge. The creditor cannot simply keep the pledged property if a default occurs (unless having previously expressly agreed on that with the debtor) – the creditor must sell the asset in a court-administered auction. Furthermore, in certain circumstances the Argentine Commercial Code allows creditors to institute a private sale of the asset, rather than being obliged to follow a court-ordered foreclosure procedure.

When a security interest takes the form of a registered pledge, the debtor retains possession of the property instead of transferring it to the creditor. As Law No. 12,962 describes, that pledge must be filed with the Registry of Pledges, through either a public deed or an authenticated private instrument, before the pledge becomes enforceable against third parties. When that act of registration occurs, the creditor must also decide whether the pledge will be 'fixed' or 'floating'. If the pledge is fixed, then the registration only encompasses the particular asset and nothing more. In contrast, if the pledge is floating, the creditor captures any changes the asset may undergo while it is registered and any additional assets that derive from those changes. The choice between a fixed and registered pledge has another consequence: jurisdiction. If a fixed pledge is chosen, the assets fall under the jurisdiction of the Registry of Pledges where they are located. In contract, floating pledges fall under the jurisdictional wing of the Registry of Pledges located where the debtor is domiciled.

Trusts, security assignments and mortgages round out the various forms of security interests. Crucially, when property is placed in a trust, the secured assets are protected

from the prying fingers of a debtor's other creditors. Argentina expressly regulated trusts in 1995 with the enaction of Trust Law No. 24,441, imbuing trusts with one key quality: limited liability for the trustee. Moreover, Section 14 also establishes that trust property will be treated separately from property belonging to either the trustee or trustor. Largely because of these two protections, trusts have become a popular component of project finance transactions in Argentina since the Trust Law was enacted.

Security assignments share some characteristics with trusts, but differ in that assigned assets are generally limited to rights or credits. Trusts are free from this limitation and can encompass most forms of assets, including moveable property and real estate. Mortgages, for their part, grant security interests over real estate, ships and aircraft, and usually secure the principal amount plus accrued interest. Created by means of a notarised deed, a mortgage only becomes valid in relation to third parties once it is registered with the Public Real Estate Registry in the jurisdiction in which the property lies.

Indeed, registration is obligatory to ensure the validity of most security interests. Mortgages and registered pledges must be catalogued – and fees paid – which are calculated on the basis of the total value of the secured asset. Certain descriptions must also be included. When registering mortgages, the value of the collateral security must be specified in the deed; if that step is overlooked the entire mortgage risks being invalidated in accordance with Section 3,109 of the Civil Code. Similarly, the value of the collateral must also be noted when registering a pledge, in addition to information regarding the applicable interest rate and the method of repayment. Finally, when executing a mortgage, notary public fees must of course be paid as well.

VI BONDS AND INSURANCE

In accordance with public works law, contractors are required to deposit 1 per cent of the total cost of the project to submit their proposal and must keep their tender within the time limit set for the tender. Pursuant to such regulation, payment of said deposit may be effected by one of the following means: (1) cash, (2) certified check, (3) public debt securities issued by the federal or provincial governments, (4) bank guarantee, (5) surety insurance, or (6) demand note.

Surety insurance may be used both in public and private contracting and can take different forms, such as: (1) bid bond, which ensures the bidder on a contract will enter into the contract and furnish the required payment and performance bonds if awarded the contract; (2) performance bond, which ensures the contract will be completed in accordance with the terms and conditions of the contract; (3) down payment or collection, which ensures that the policyholder will use the advance payments received for the material supply; or (4) funds for reparation orders.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

As described above, self-help remedies are forbidden, no matter what the collateral. A creditor simply cannot hold onto a security interest as payment in kind (with a certain exception regarding pledges). If and when it comes time to foreclose on a collateral

security interest outside a bankruptcy proceeding, a public auction must be held, unless the debtor and creditor agree to a special sale in advance. A private sale is technically possible when foreclosing on a mortgage, but even then the courts are intimately involved.

The process of foreclosing on a pledge differs depending on whether the pledge is ordinary or registered. As mentioned above, a pledged asset will usually be sold at public auction; it can also be sold in a private sale if previously agreed upon by the debtor and creditor in advance. Otherwise, that too must be sold in a public auction, announced in the Public Gazette 10 days before the auction is to take place. If the pledge consists of shares, securities, or other assets traded on the stock market, they can be sold through a broker beginning only a day after the default occurs. If the pledge is registered, the foreclosure process varies in accordance with whether the secured party is classified as a 'financial entity' under the Financial Entities Law No. 21,626, as decreed by the Central Bank. If the secured party does not fall under the classification of financial entity, then the lender must pursue a judicial foreclosure proceeding similar to that described below for mortgages.

Mortgages are foreclosed upon through either a summary proceeding in court that ends with the public auction of the property, or a speedier, more simplified process in which the creditor can assume a greater role. In the traditional judicial proceeding, the property is sold to the highest bidder at auction (the lender is permitted to bid on the property as well), as long as the debtor does not offer any successful defences. After the sale, the proceeds are deposited in a bank under court order and the creditor's claim is satisfied against such proceeds. This traditional foreclosure process can take anywhere from one to two years from start to finish.

If a debtor is insolvent, the procedures differ yet again depending on whether the debtor decides to pursue a judicial reorganisation or a bankruptcy proceeding. The reorganisation procedure can only be instigated by the individual or corporate debtor in question, who must file a petition for relief under the Bankruptcy Law together with evidence of the debtor's inability to satisfy debts and ability to reorganise. Once this petition has been filed, all claims by unsecured creditors are in effect stayed, although creditors may proceed with claims related to mortgages and pledges if and only if they give notice to the bankruptcy court. That is to say, the creditor will have to request admittance of its credit and collateral to the relevant court.

Bankruptcy proceedings, on the other hand, can be commenced either voluntarily by the debtor or involuntarily by the debtor's creditors. In contrast to the reorganisation process, the debtor is not allowed to manage its own assets; a trustee is appointed as administrator in its place. All creditors – including preferred creditors – must submit evidence of their claims to the debtor's trustee. Certain creditors do retain an advantage, however, when it comes time to distribute the debtor's assets. Creditors with a lien over a particular secured asset are granted a special preference by law, which entitles them to priority over the proceeds from the sale of that asset. In addition, Section 239 of the Argentine Bankruptcy Law provides for the subordination of debt, with the result that senior creditors will be paid before subordinated lenders. It is important to note, however, that lenders will not incur liabilities if project assets are foreclosed upon.

VIII SOCIO-ENVIRONMENTAL ISSUES

Beyond the litany of usual permits needed for a particular building project, Argentina has one licensing requirement that applies specifically to foreign citizens and companies. That is to say, foreign nationals who wish to acquire land in a 'border security zone' must seek special permission from the National Commission of Security Zones to complete their purchase. Generally speaking, these zones encompass land that lies within 150 kilometres of Argentina's borders, or within 50 kilometres of the sea. This permission is typically granted within about six months. However, local companies controlled by foreign nationals are deemed to be 'foreign companies' for the purposes of this legislation, in contrast to standard corporate legislation. Moreover, this licensing requirement applies even if a foreign company decides to acquire shares in a local company that already holds land in a security zone; if management of the local company shifts into foreign hands, permission from the National Commission of Security Zones must be granted before the transaction can proceed.

In tandem with the amendment of the Constitution in 1994, environmental legislation and sanctions for environmental violations have increased. As professed by Section 41 of the Argentine Constitution: 'All inhabitants are entitled to the right to a healthy and balanced environment fit for human development […] and shall have the duty to preserve it.' Furthermore, the Constitution requires that a person or company who damages the environment has the 'obligation to repair it according to law'. If a person believes that his or her environmental rights are being infringed upon, he or she can file a Section 43 summary proceeding, called an *amparo*, for immediate injunctive relief. Environmental legislation exists not only at the federal level in Argentina, but at the provincial level as well. At the federal level, Congress has the power to set forth minimum standards legislation for the protection of the environment, which is applicable throughout the country. Conversely, the provinces may establish supplementary legislation to these minimum standards either by enacting more stringent regulations or by passing their own environmental regulations in areas in which the federal government has not established such minimum standards.

Certain environmental legislation specifically prescribes criminal penalties for environmental transgressions (e.g., the National Hazardous Wastes Law No. 24,051 and the Buenos Aires Special Wastes Law No. 11,720 hold representatives of companies liable for environmental damages caused by the activities of their companies, to the extent of their participation in the action). Further, some courts have invoked Section 200 of the Criminal Code regarding crimes against public health to sanction people who release hazardous substances into the environment. Otherwise, administrative sanctions, injunctive relief or civil penalties usually accompany environmental offences.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

PPPs are not as popular in Argentina as in other Latin American countries. Although the Constitution does not restrict the power of the state to enter into public-private contracts, the federal government has yet to pass legislation that specifically addresses PPPs. In 2005, however, the National System of Public-Private Partnerships was established by executive decree with the stated goal of attracting private investments

to the construction of public services and infrastructure. In addition to setting forth the goals of a transparent and collaborative procedure for PPP investments, the decree describes the specific mechanisms by which such tenders are selected and the qualities that a successful bid will possess; for example, the decree states that a winning project will be technically and economically feasible, adequately financed through private means and backed by a favourable investment history. Moreover, a public need must be identified and declared before a tender process involving PPPs can even begin.

This selection regime is often a win-win situation for both the government and private actors. The state has a potentially wide range of projects to choose from, while at the same time avoiding the cost and effort involved in designing and analysing projects itself. The private actor, on the other hand, can count on a transparent and competitive bidding process. Indeed, the federal government is not alone in recognising the benefits of such a framework; provincial governments have also established private initiative schemes to govern the solicitation and selection of private proposals for public infrastructure projects.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

According to the Business Associations Law No. 19,550, foreign companies may only engage in 'isolated' activities in Argentina if they are not registered in the country. Although an exact definition of 'isolated' is not provided by the law, a project finance transaction would likely not fall under its scope. Thus, to perform regular activities in Argentina, the foreign company has to register either a branch or a local subsidiary. If it fails to do so – and carries out 'regular' activities nonetheless – the company assumes the risk that its activities will be unenforceable and its representative held jointly liable. Therefore, it is advisable that project finance transactions be organised locally.

The most convenient forms of legal entities for foreign investors include the stock corporation, limited liability company and the branch. Whereas the first two forms limit the liability of the shareholders with respect to third parties, when the entity is organised as a branch, the foreign parent company can be held liable for its activities. Consequently, project companies are usually organised as a stock corporation, both to limit liability and invoke the favourable tax treatment of corporations.

With the exception of investments in certain sectors, including rural land, energy and broadcasting, foreign investors are granted the same rights under the Argentine Constitution as local investors and may invest in any economic or productive activity. In terms of taxation, foreign investors are also treated largely the same as locals: they, too, must pay federal, state and municipal taxes, although dividend payments are immune from taxation. But there exists one salient difference: profits from the sale of shares in an Argentine company are not taxed as income if the seller is a non-resident investor.

Although Argentina has a free foreign exchange market, the Argentine Central Bank (ACB) has established certain restrictions concerning the entrance of funds into the country and their transfer abroad. First, all transfers of funds to Argentina made by non-residents must be registered with the ACB. Second, these funds have to remain in the country for a period of at least 365 days, beginning with the day they are registered, unless an exemption applies (see below). During that time, 30 per cent of funds will be

held in a non-endorsable, non-interest-bearing statutory reserve in US dollars, which cannot be used as a guarantee or collateral to any kind of debt. After the 365-day period has ended, the reserve will be freely available in Argentina, but will still be subject to other foreign exchange regulations if they are transferred abroad.

Significantly, foreign direct investments are exempt from the 365-day obligation, although they must still be registered with the ACB. According to Central Bank Communication 'A' 4237, a foreign direct investment is defined as any equity participation in a local company that exceeds 10 per cent of its capital stock or votes. Once that minimum percentage is reached, any subsequent contribution made by the foreign investor will qualify as a foreign direct investment, regardless of actual amount or percentage.

Since 2011 further limitations, especially regarding acquisition of foreign currency and transfer of profits abroad, have been set. Moreover, the government has enacted several regulations and informal or *de facto* restrictions that hinder the transfer of funds abroad. Therefore, apart from the regulatory treatment for each transfer concept, and even when complying with all formal requirements, often transfers abroad cannot be completed because of such restrictions. This situation is aggravated by the fact that the purchase of foreign currency in Argentina is authorised only in very limited situations and at an 'official' rate of exchange, which is, at the time of writing, 80 per cent lower than the 'informal' rate of exchange. This means that whoever wires foreign currency to the country is paid in pesos at the official rate of exchange, while its costs and expenses (e.g., for infrastructure) in Argentina will be valued at the informal rate of exchange. This is hindering foreign investment in Argentina.

XI DISPUTE RESOLUTION

Argentine courts do not jealously guard their jurisdictional power. Parties to a contract can choose to submit to the jurisdiction of a foreign court as long as there exists some sort of connection to the chosen jurisdiction and the dispute is pecuniary. There is an exception to this openness, however: Argentine courts claim exclusive jurisdiction over debtors domiciled in the country. If the debtor's domicile is abroad, insolvency proceedings in Argentine courts will only touch those assets held in the country.

With regard to choice of law, contractual parties are generally free to choose which laws will govern their agreements. The major caveat is that foreign law will not be accepted if it flouts Argentine public policy. As a consequence, disputes involving bankruptcy, tax, criminal and labour laws will be governed by the Argentine public policy laws corresponding to those areas. Significantly, Argentine law also governs rights and legal actions related to real estate and moveable property located permanently in the country.

Foreign judgments and arbitral awards, for their part, are enforceable in Argentina, either in accordance with international treaties or the National Code of Civil and Commercial Procedure (CPCCN). If a country has signed a treaty with Argentina regarding foreign judgments, those procedures will prevail; if not, the CPCCN applies in federal court. (Each province has its own rules for enforcement of foreign judgments in its local courts.) Article 517 of the CPCCN sets out several requirements that

a foreign judgment must meet for it to be enforced in Argentina. The judgment must have been issued by a competent court, as determined by Argentine law; be final and valid in the foreign jurisdiction, and later authenticated according to Argentine law; and cannot conflict with Argentine public policy law, nor with a prior or contemporaneous judgment in Argentine courts. Finally, the defendant must have enjoyed due process of law, including a proper summons and a chance to defend itself.

Once all those prerequisites are fulfilled, a number of procedural requirements must also be satisfied before enforcement can occur. The petitioner must file a statement proving that the aforementioned legal requirements are satisfied; all documents in a foreign language must be translated into Spanish by a translator registered in Argentina; a copy of the foreign judgment must be notarised and filed with the appropriate Argentine court; and all pertinent documents must be authenticated by the Argentine consulate located in the foreign court's jurisdiction. Finally, a 3 per cent court tax will have to be paid upon enforcement.

The enforcement of foreign arbitral decisions follows the same framework. As long as both the legal and procedural steps are fulfilled, the foreign arbitral award will be accepted by Argentine courts. If a treaty applies, however, its procedural and substantive requirements take precedence. Notably, Argentina has been bound by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since 1988.

XII OUTLOOK AND CONCLUSIONS

This chapter should be taken simply as an outline of the project finance landscape in Argentina. While the legal framework does not differ much from other Latin American countries, decisions regarding investments in public works have been unusually politicised in Argentina of late. In Argentina's current political climate, PPPs are not pursued unless they suit a political end.

That notwithstanding, project finance investment should increase in the coming years as infrastructure needs grow and mining and energy technology advances. Future projects are liable to involve not only the creation of new structures, but also the maintenance of existing structures. The business environment, however, has of late not been very encouraging for investors (either foreign or local), as has been explained. This, though, is something expected to change shortly, since general elections will take place in Argentina in October 2015, and there is a marked optimism in the business community that the country will return to the international markets and project finance investment, therefore, is a field that will be developed in the near future.

Last but not least, in August 2015 a new Unified Civil and Commercial Code will enter into force in Argentina, superseding the Civil and Commercial Codes that have been in force in the country for the past 150 years. The impact this new code will have has not yet been assessed.

Appendix 1

ABOUT THE AUTHORS

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Pedro Nicholson is the head of the real estate and hospitality department of Estudio Beccar Varela. He has vast experience in real estate, hospitality, tourism, mergers and acquisitions, and corporate finance. He has advised local and foreign clients in all sorts of local and international deals.

Pedro has lectured at conferences in Argentina and abroad, and has been recognised as a leading real estate lawyer by *Chambers and Partners* and *PLC* each year since 2007, and by *Best Lawyers* for 2012. He has further been recognised as a recommended M&A lawyer by *PLC* since 2003 and by *Best Lawyers* for 2012.

He is president of the Alumni Association of the Real Estate Business Centre of the University of San Andrés, co-chair of the real estate committee of the American Chamber of Commerce in Buenos Aires, a member of the executive committee of the Housing Entrepreneurs Association, and an officer of the real estate committee of the International Bar Association. From 2002 to 2005, Pedro held the position of professor of modern contracts on the postgraduate corporate programme at the University of Palermo, in Buenos Aires. Pedro is currently professor on the hotel business management and hotel investment postgraduate courses at the Torcuato Di Tella University. Pedro obtained a postgraduate degree in real estate transactions from the University of San Andrés (2006), a postgraduate degree in hotel investment from the University of San Andrés (2009), an LLM from the University of Illinois at Urbana-Champaign (1993) and worked as a foreign associate at Hogan & Hartson, Washington, DC (1995).

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